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NO. 82-15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RAY OLIVER, Petitioner

v.

UNITED STATES, Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA (ACLU-NC), MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF), AND CALIFORNIA RURAL LEGAL ASSISTANCE (CRLA) IN SUPPORT OF PETITIONER

Margaret Crosby
Alan Schlosser
Amitai Schwartz
ACLU-NC

Joaquin G. Avila
Morris J. Baller
John E. Huerta
Susan E. Brown
MALDEF

David Grabill
CRLA

ERIC NEISSER
Stanford Law School
Stanford, CA 94305
(415) 497-3478

Counsel of Record
for Amici Curiae

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INTEREST OF AMICI CURIAE[1/]

The American Civil Liberties Union of Northern California (ACLU-NC) is an affiliate of the American Civil Liberties Union which this Court has recognized as a "national non-partisan organization defending our Bill of Rights for all without distinction or compromise." In re Primus, 436 U.S. 412, 414 n.2 (1978). The national ACLU and its affiliates "engage in extensive educational and lobbying activities" and "devote much of their funds and energies to an extensive program" of "litigation that has defined the scope of

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1/ Letters from counsel for both parties consenting to the filing of a brief amicus curiae on behalf of these three organizations are on file with the Clerk of this Court.

constitutional protection in areas such as . . . privacy." Id. at 427-28. The Mexican American Legal Defense and Educational Fund (MALDEF) is a non-profit, non-partisan organization dedicated to the advancement, primarily through education and litigation, of the rights and opportunities of Americans of Mexican heritage. California Rural Legal Assistance (CRLA) is a legal services program providing representation in civil matters to indigents in rural California.

The ACLU-NC, MALDEF, and CRLA have in the past and are currently representing a number of employees and the commercial enterprises, including agricultural businesses, for which they work in litigation concerning entries and searches of commercial premises and

detention and questioning of employees by agents of the Immigration and Naturalization Service and other government agencies. The scope of the "open fields" doctrine is central to determination of the limits upon governmental intrusion in these contexts. The decision in this case will therefore directly affect both the rights of the litigants involved and the litigative, legislative, administrative, and educational efforts of these three organizations to protect and enhance rights of privacy, personal security, and freedom from unreasonable searches and seizures.

SUMMARY OF ARGUMENT

From Hester v. United States, 265 U.S. 57 (1924) through Marshall v. Barlow's Inc., 436 U.S. 307 (1978), this Court has consistently interpreted the "open fields" doctrine to permit a warrantless entry by government agents upon commercial private property only if the owner has not exhibited an intent to retain privacy and has generally permitted the public at large to encroach upon that portion of the premises. The dictum in Olmstead v. United States, 277 U.S. 438 (1928), suggesting that privacy rights are limited to particular locations, such as the "curtilage," has long since been rejected by this Court. Nevertheless, it has misled some lower courts, such as the majority below, into a rigid

locational application of the "open fields" doctrine, which is inconsistent with this Court's Fourth Amendment jurisprudence.

The common law property right to exclude others creates a legitimate expectation of privacy protected by the Fourth Amendment. The right to exclude is particularly important in the commercial setting because it permits operation of the business free from unwarranted disruption. In order to assert their privacy interests, property owners need only take customary precautions reasonably calculated to alert the public. A pragmatic approach to the precautions required to assure privacy is particularly important in the commercial context because more impregnable barriers would interfere

with the effective operation of a commercial enterprise, including free movement of its employees.

Broad-scale, arbitrary intrusions upon commercial enterprises, such as INS farm and ranch operations, not only infringe upon the Fourth Amendment rights of commercial owners but also threaten the personal security and privacy interests of their employees. This Court has vigorously protected the individual right to personal security in public places. The Fourth Amendment interests of people in "open fields," recognized by the court below, can only be effectively protected if random large-scale entries are prohibited.

I. THE "OPEN FIELDS" DOCTRINE FIRST ARTICULATED IN HESTER V. UNITED STATES IS CONSISTENT WITH SUBSEQUENT FOURTH AMENDMENT JURISPRUDENCE PROTECTING EXPECTATIONS OF PRIVACY THAT SOCIETY RECOGNIZES AS LEGITIMATE.

This Court has repeatedly been called upon to clarify the relationship between the interests protected by the Fourth Amendment and the rights attendant upon ownership of private property. From Hester v. United States, 265 U.S. 57 (1924), through Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), this Court has consistently explained that the property right to exclude normally creates a legitimate expectation of privacy protected by the Constitution, see, e.g., Rakas v. Illinois, 439 U.S. 128, 144 n. 12 (1978), although a technical trespass by the government will not violate the Fourth Amendment where the

right to exclude has not been regularly asserted against the general public. See, e.g., Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861 (1974). In addition, legitimate Fourth Amendment interests can also exist in the public domain where no one can assert private property rights. See, e.g., Reid v. Georgia, 448 U.S. 438 (1980) (public airport); Katz v. United States, 389 U.S. 347 (1967) (public telephone booth). This case requires the Court once more to clarify this interaction between property and Fourth Amendment rights because of a misconception by the court below, engendered by the use of a rigid locational approach in Olmstead v. United States, 277 U.S. 438 (1928), as to the Fourth Amendment interests that may be asserted by property owners in

land stretching beyond the perimeters of residential use.

We start from common ground. As Justice Rehnquist wrote for the Court in Rakas, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude." 439 U.S. at 144 n. 12. But even property owners ordinarily must "have exhibited an actual (subjective) expectation of privacy," Katz, 389 U.S. at 361 (Harlan, J., concurring), if they wish to retain constitutional protection against unwanted police intrusion upon their property. "Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not

'protected' because no intention to keep them to himself has been exhibited." Id.

Hester is entirely consistent with this analysis. There, federal agents, who had prior information about Hester's involvement in the moonshine liquor trade, trespassed upon a portion of Hester's father's private property, 50 to 100 yards from his home, from which the public was not generally excluded. From that position they saw Hester come out of the house and hand a quart bottle to Henderson. When an alarm was given, the two men fled and dropped bottles later determined to contain bootleg whiskey. Hester's claim of a Fourth Amendment violation based upon the warrantless trespass upon his father's land was rejected by the Court

with this summary statement:

> The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle . . . This evidence was not obtained by the entry into the house . . . [T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields.
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> 265 U.S. at 58-59.[2/]

The Court did not need to consider whether the area was within or without the "curtilage" because, to use

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2/ The Hester opinion continued: "The distinction between the latter [the open fields] and the house is as old as the common law," citing Blackstone. Id. at 59. Blackstone, however, discusses only whether entry of certain areas of a private residence constitutes the common law crime of burglary, noting that all buildings and land "within the curtilage" are covered. 4 W. Blackstone, Commentaries 225 (1791). He did not claim that the distinction has any relevance to the common law property right to exclude. See pp.26-27 infra.

Justice Harlan's terms, Hester had exposed his bottles and liquor transactions to the view of outsiders, had not exhibited any intention to keep them to himself or to keep strangers from his father's land, and thus had forfeited his constitutional protection against unwanted police intrusion. As Justice Black explained, Hester stands for the proposition that "what a person knowingly exposes to the public is not a subject of Fourth Amendment protection." Coolidge v. New Hampshire, 403 U.S. 443, 509 n. 6 (1971) (Black, J., concurring and dissenting).

The same analysis was used in Western Alfalfa where Justice Douglas, writing for a unanimous Court, invoked Hester in rejecting a commercial enterprise's Fourth Amendment objection to a

warrantless trespass. The state inspector there entered the outdoor premises of a business establishment, without consent, to conduct a pollution test on smoke emitted from the plant. The Court's reasoning confirms the congruence of Hester, Katz and Rakas:

> The field inspector did not enter the plant or offices . . . nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky--plumes of smoke. The Court in Hester v. United States . . . speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in "the open fields." The field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded . . . [H]e is well within the "open fields" exception to the Fourth Amendment approved in Hester.
>
> 416 U.S. at 864-65 (emphasis added).

Marshall v. Barlow's Inc. confirmed this view and clarified that the scope of Fourth Amendment protection of commercial property is not diminished because employees are on the premises. The Court held that a warrant was required before a government health and safety inspector could examine areas open only to employees, explaining:

> The Government inspector, however, is not an employee. Without a warrant, he stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the government inspector as well. The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.
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> Id. at 315

Indeed, as the Court explained in Barlow's, a major impetus to enactment of the Fourth Amendment was the reaction

to general warrants "acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists." Id. at 311. Protection of commercial premises from open-ended and unjustified governmental intrusion is thus not only consistent with this Court's holdings but compelled by the history and purpose of the Amendment itself.

In sum, the "open fields" doctrine permits the government to enter upon private property, commercial or otherwise, and to utilize the information derived from its observations there, only if the owner has not exhibited her intent to retain privacy and has generally permitted the public at large to encroach

upon that particular part of the premises. 3/ For this reason, the Court was

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3/ The "open fields" doctrine is derived from the same conceptual framework as the "consent" and "plain view" doctrines. The "consent" doctrine recognizes that an individual with a legitimate expectation of privacy may voluntarily forfeit it in a specific instance to the police, even though she has not generally waived constitutional protection by permitting the public at large to enter the same premises. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). See infra note 4 . The "plain view" doctrine, like the "open fields" doctrine, permits the police to utilize any information inadvertently gathered from observations made while lawfully admitted to a location. But as the Court explained in Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971), "plain view" only comes into play if the police "had a prior justification for an intrusion," such as a warrant or"hot pursuit." Significantly, Coolidge cites Hester as an example of the police coming across evidence while in "hot pursuit" of a fleeing suspect, id. at 465, and does not even mention "open fields" as a justification for initial police intrusion upon property. Id. at 465-66. See also id. at 515 (White, J. concurring and dissenting) (also citing Hester as involving "plain-sight seizures . . . arising in the course of a hot-pursuit search for a felon").

careful in Hester to limit the concept to "open fields" not "fields" in general.

The only decision in this Court perceived as inconsistent with this understanding--Olmstead v. United States, 277 U.S. 438 (1928)--did not in fact involve an "open fields" question and in any case rests upon a Fourth Amendment analysis long since discarded by the Court. In Olmstead, federal officers intercepted conversations on petitioners' phones without trespassing upon any of their property, simply by placing taps on telephone lines on the street and in the basement of a large office building. Id. at 457. The majority there, relying upon the now outdated view that only physical "entry" upon private property was prohibited,

found no Fourth Amendment violation and stated in dictum that only "an actual physical invasion of [the] house 'or curtilage'" would constitute a "search" in the constitutional sense. Id. at 466. No issue as to the scope of the "curtilage" was involved in Olmstead, however. Yet its approach has often been relied upon since as establishing that a police trespass upon an area outside the "curtilage" does not require a warrant. See, e.g., United States v. Diaz-Segovia, 457 F. Supp. 260, 270 (D. Md. 1978) ("The rule of law . . . is that agents are allowed to trespass upon individual's [sic] property as long as they do not search the house or curtilage").

In Katz, however, the Court explained that "the reach of [the Fourth]

Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure" and that "the underpinnings of Olmstead . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353. Thus the error in Olmstead rejected in Katz was not, as the majority below claims, 686 F.2d at 359, that the Court failed to recognize that electronic intrusions did not exist in 1791. Rather, the error in Olmstead was the limiting of Fourth Amendment protection to specified locations, such as the curtilage, regardless of the severity of the governmental intrusion.4/

4/ In dissent in Olmstead, Justice Brandeis explained that Hester stood only for the proposition that there

The rigid locational application of the "open fields" concept derived from Olmstead is wholly inconsistent with the approach in Katz. For example, in Conrad v. State, 63 Wis. 2d 616, 218 N.W. 2d 252 (1974), the Wisconsin Supreme Court admitted that the sheriff had "committed an outrageous trespass" id. at 624, 218 N.W. 2d at 256, by bringing a large mechanical backhoe and scraper into Conrad's farm, moving several doghouses adjacent to his home, digging some 15 holes, many of them two or three feed deep, at random between the doghouses near the home and a rock pile some 450 feet away, and then

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4/ (con't) was no search because the evidence was obtained through "voluntary disclosures by the defendant." 277 U.S. at 478 n. 11.

bulldozing the rockpile and digging another hole under it. Nevertheless, the court held that this warrantless search-and-destroy mission did not violate the Fourth Amendment because the rockpile, where a corpse was finally discovered, was beyond what the court understood to be "the curtilage."

Reliance upon this mechanical dwelling-plus-curtilage misconception in the commercial setting threatens to undermine this Court's precise demarcation of personal liberty and privacy interests in the public domain. The Immigration and Naturalization Service (INS) expressly relies upon this misunderstanding to justify its random farm and ranch checks for undocumented workers. In responding to a recent Congressional inquiry about the legal

basis for "immigration officers to search open agricultural fields for illegal aliens," INS Commissioner Alan Nelson stated:

> [I]t is well-settled law that the Fourth Amendment does not bar entry onto so-called "open fields" by a law enforcement officer in the performance of his official duties. The term "open fields" has been interpreted to include private lands but not including dwellings or the immediately surrounding area. See Hester v. U.S., 265 U.S. 57 (1924)).
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> 128 Cong. Rec. S10248-49 (daily ed. Aug. 11, 1982) (letter from Commissioner Nelson to Senator Simpson, dated August 10, 1982).

The unrestricted entries excused by this approach not only infringe upon the Fourth Amendment rights of farmowners but also threaten to undermine the constitutional rights of personal security and privacy guaranteed to farmworkers. Surely workers retain at least as much constitutional protection on a farm or ranch or in a factory as they do on the

street or in a car. Brown v. Texas, 443 U.S. 47 (1979); Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

The decision below, the INS position, and scattered decisions such as Conrad illustrate the havoc that the discarded locational analysis derived from the Olmstead dictum can continue to wreak on this Court's considered Fourth Amendment jurisprudence. Once this misunderstanding is dispelled, the Court can address the question posed here and properly resolved in Western Alfalfa and Barlow's: whether a property owner can legitimately assert an expectation of privacy in property that is used for commercial purposes.[5/]

5/ Because of the large acreage involved and the distance from Oliver's home, it is apparent that the marijuana

II. THE FOURTH AMENDMENT PROTECTS A COMMERCIAL PROPERTY OWNER'S ASSERTION, THROUGH NORMAL PRECAUTIONS, OF THE COMMON LAW RIGHT TO EXCLUDE OTHERS TO PREVENT INTERFERENCE WITH THE COMMERCIAL ENTERPRISE.

Although this Court has rejected the premise that only property interests limit the power of the government to search and seize, see, e.g., Katz, 389 U.S. at 353, it continues to rely on useful concepts drawn from the common law of property in determining whether a person has a legitimate expectation of privacy with respect to a particular place. See, e.g., Rakas, 439 U.S. at 144 n. 12 ("the Court has not altogether abandoned use of property con-

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5/ (con't) crop discovered here was a commercial venture, albeit an illegal one, no different in Fourth Amendment terms from the bootleg operation in Hester, the farm in Conrad, and the industrial plants in Western Alfalfa and Barlow's.

cepts in determining the presence or absence of the privacy interests protected by [the Fourth] Amendment"); Marshall v. Barlow's, Inc., 436 U.S. at 312 ("If the government intrudes upon a person's property, the privacy interest suffers"); and Alderman v. United States, 394 U.S. 165 (1969)(a property interest in the premises would require suppression of evidence garnered through electronic surveillance of conversations on the premises, even if the owner was neither present at nor a participant in those conversations). As Justice Powell has observed, "property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations

of privacy are reasonable." Rakas, 439 U.S. at 153 (Powell, J., concurring).

The common law has long recognized that one of the essential incidents of property ownership is the right to exclude others. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164, 3176 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in the owner's bundle of property rights"); PruneYard Shopping Center v. Robins, 447 U.S. 74, 82 (1980); International News Service v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) ("Property depends upon exclusion by law from interference"); Pound, The Law of Property and Recent Juristic Thought, 25 A.B.A.J. 993, 997 (1939) (observing that the "jus

prohibendi or right of excluding others" is one of the six basic rights incident to ownership of property); and 2 W. Blackstone, Commentaries, ch. 1 (11th ed. 1791). Indeed, the notion that the right to exclude attends property ownership is so deeply entrenched in our jurisprudence that this Court has been reluctant to subordinate this right to the statutory right to organize employees, see, e.g., NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), or even to the dictates of the First Amendment. See, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976), and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

In the commercial setting, the right to exclude is crucial not only to secure the privacy of the owner and the employees, but also to permit efficient

operation of the business. No commercial enterprise can be expected to function smoothly if inquisitive members of the public, or agents of the government, can routinely intrude. The importance of efficient business operation free from unnecessary inteference has been recognized by this Court in other contexts. See, e.g., Republic Aviation v. NLRB, 324 U.S. 793 (1945) (upholding the rights of employees to solicit for a union during non-working time, so long as business efficiency is not compromised), cited with approval in Eastex, Inc. v. NLRB, 437 U.S. 556, 573, n. 22 (1978). Indeed, this Court has held that under the Fourth Amendment: "[t]he businessman . . . has a constitutional right to go about his business free from unreasonable

official entries upon his private commercial property." See v. Seattle, 387 U.S. 541, 543 (1967).

The right of a property owner to exclude others creates a presumptively legitimate expectation of privacy. See Rakas, 439 U.S. at 144 n. 12 ("one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude"). This presumption may properly be defeated only when the property owner has failed to exercise her right to exclude. Compare Western Alfalfa, 416 U.S. at 865 (the Fourth Amendment does not bar field inspector from entering commercial property where he was not "on premises from which the public was excluded") with See v. Seattle, 387 U.S. at 545

("administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled . . . within the framework of a warrant procedure").

Petitioner here unmistakably exercised his right to exclude by taking a farmer's customary precautions: fencing that portion of his property he wished to secure from intruders, placing a locked metal gate across the access road, and posting numerous signs explicitly alerting potential intruders that they were not welcome. United States v. Oliver, 686 F.2d 356, 362 (6th Cir. 1982) (Keith, J., dissenting). Short of surrounding his property with an insurmountable wall, an electrified fence, or a moat filled with alligators, Mr. Oliver could not have demonstrated

more clearly his intent to exercise his right to exclude.

As amicus curiae in Florida v. Brady, No. 81-1636, another case concerning the scope of the "open fields" doctrine in which this Court has granted certiorari, 102 S.Ct. 2266 (1982), the government, respondent here, has argued that only a landowner who "takes substantial measures to exclude the public" may reasonably expect constitutional protection from warrantless governmental intrusion. Brief for the United States as Amicus Curiae in Support of Petitioner at 17, Brady. Rejecting ordinary posting and fencing as inadequate, the government offers only two examples of sufficient precautions -- erecting an "eight-foot fence topped with barbed wire," citing United States

v. FMC Corp., 428 F. Supp. 615 (W.D. N.Y. 1977), aff'd, 572 F.2d 902 (2d Cir. 1978), and a high wall assailable only by means of a "special ladder" or other "equipment." Brief for the United States as Amicus Curiae at 17 and 24 n. 15, Brady. Indeed, the government contends that Brady had no legitimate expectation of privacy in his elaborately fenced and posted ranch even though "deputies were forced to cross a dike, ram through one gate and cut the chain lock on another, [and] cut or cross posted fences," State v. Brady, 406 So. 2d 1093, 1094-95 (Fla.), cert. granted, 102 S.Ct. 2266 (1982), to effect their warrantless entry. Brady, this Court is told, lacked a legitimate expectation of privacy because it was not strictly necessary for the surveillance team

"to break the lock on the gate in order to enter the ranch." Brief for the United States as Amicus Curiae at 23-24, Brady. In essence, the government claims that normal precautions are constitutionally inadequate if they prove insufficient to preclude entry by "persons with a strong desire to enter." Id. at 14.

Fortification of private lands has never been a condition of Fourth Amendment protection. The Constitution protects a person's reasonable expectation of privacy; it does not require one to secure it by force. Indeed, to compel a landowner to construct physical barriers sufficient to secure property against invasion by government agents determined to violate a manifest intent to exclude is to shift to the citizen

the onus of performing the very function the Amendment was designed to serve: "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). Surely the protection of the Amendment is not reserved for landowners financially able or willing to insulate themselves from governmental intrusion by fortifying their lands or using violent means threatening life or limb.[6/] As Professor LaFave has cautioned,

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6/ Indeed, both criminal law and tort law have long imposed liability for the use of force to protect against trespass. See, e.g., People v. Ceballos, 12 Cal. 3d 470, 526 P.2d 241, 116 Cal. Rptr. 233 (1974) (unanimously upholding conviction for assault with a deadly weapon where youth attempting to burglarize defendant's garage was wounded by spring gun set by defendant); Simpson v. State, 59 Ala. 1, 14 (1877) ("It is an inflexible principle of the criminal law of this State, and we believe of all the States,

"the occupants of business and commercial premises should not be put to the choice of taking extraordinary methods of sealing off those premises or else submitting to unrestrained police surveillance." 1 W. LaFave, Search and Seizure § 2.4(b) (1978). See also

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6/ (con't) as it is of the common law, that for the prevention of a bare trespass upon property, not the dwelling-house, human life cannot be taken, nor grievous bodily harm inflicted"); Katko v. Briney, 183 N.W. 2d 657 (Iowa 1971) (upholding an award of $30,000 to plaintiff injured when spring gun, set by defendant in an uninhabited farm house primarily used for storage, discharged during plaintiff's burglary attempt); R. Perkins and R. Boyce, Criminal Law 1155 (3d ed. 1982) ("the use of force intended or likely to cause death or great bodily injury is never authorized for the defense of property"); and 1 F. Harper and F. James, The Law of Torts 250 (1956) ("It is uniformly held that the possessor of land or goods cannot use force reasonably calculated to cause death or serious bodily harm for the purpose of

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 403 (1974) (Katz holds that the Fourth Amendment protects against invasions of "the right to maintain privacy without giving up too much freedom as the cost

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6/ (con't) defending his bare dignitary interests in the property").

On the other hand, the law has long recognized "a privilege to use non-deadly mechanical devices (such as barbed wire) to protect property." Posner, Killing or Wounding to Protect a Property Interest, 14 J.L. & Econ. 201, 204 (1971). See also Quigley v. Clough, 173 Mass. 429, 53 N.E. 884 (1899) (per Holmes, J., for a unanimous court) (holding that an owner who erected a barbed wire fence to protect his land from trespass was not liable to a person injured while attempting to cross the land without the owner's permission; observing that the use of barbed wire fencing "simply shows an intent to make it more difficult to pass the line of the fence"); 1 Restatement (Second) of Torts § 84 (1965); and Bohlen and Burns, The Privilege to Protect Property By Dangerous Barriers and Mechanical Devices, 35 Yale L. J. 525, 528-36 (1926).

of privacy"). Moreover, to hold that a landowner has no legitimate expectation of privacy if reasonable precautions prove insufficient to keep overzealous government agents off the land is tantamount to holding that one who fails to lock the door to her home may not claim the protection of the Fourth Amendment.[7/]

7/ The government, as amicus in Brady, and the Oliver majority below both suggest that there is a lessened expectation of privacy in a field or commercial venture because it is open to aerial surveillance, which they assume is constitutional. See Brief for United States as Amicus Curiae 18 n. 10, Brady, and Oliver, 686 F.2d at 360 n. 4. Aerial surveillance is in no sense an issue in this litigation, as none was attempted here. The Court should properly consider the constitutionality of this practice only in a case where it has actually occurred and the record presents facts relevant to the practice and the nature of the privacy intrusion.

The reasons for avoiding an issue not before the Court are especially strong here, where the issue is complex and the courts divided. Compare People v. Sneed, 32 Cal. App. 3d 535, 108

7/ (con't)
Cal. Rptr. 146 (1973) and Dow Chemical Co. v. United States, 536 F. Supp. 1355 (E.D. Mich. 1982); with United States v. Allen, 675 F.2d 1373 (9th Cir. 1980); Dean v. Superior Court, 35 Cal. App. 3d 112, 110 Cal. Rptr. 585 (1973); State v. Stachler, 58 Haw. 412, 570 P.2d 1323 (1977); and State v. Layne, 623 S.W. 2d 629 (Tenn. Cr. App. 1981). See generally Annot., 56 ALR Fed. 772 (1982).

Indiscriminate aerial surveillance is a modern version of the freewheeling general searches under the hated colonial writs of assistance, which John Adams viewed as a major cause of the American Revolution. N. Lasson, The History and Development of The Fourth Amendment To The United States Constitution 58-59 (1970). For example, in State v. Layne, supra, the police flew a helicopter over a wide area "searching for stripped cars, moonshine stills, patches of marijuana, and law violations generally." 623 S.W. 2d at 631. John Adams would no doubt be deeply disturbed to learn that the Amendment that was written to prohibit the general searches of his day would prove so frail as to permit this type of wide-ranging, discretionary search for crime.

Nor can aerial surveillance be justified, as suggested in Layne, 623 S.W. 2d at 636, by analogy to the familiar police cruiser on the lookout for criminal acts in "plain view." Police cruisers do not travel through backyards, across farmland, or (except in parts of Florida) through fences and locked

7/ (con't) gates. Though upholding an aerial search, the court in Dean suggests the limitations of the "plain view" rationale.

> Today's sophisticated technology permits overflights by vehicles orbiting at an altitude of several hundred miles. Tomorrow's sophisticated technology will supply optic and photographic devices for minute observations from extended heights. Judicial implementations of the Fourth Amendment need constant accommodation to the ever-intensifying technology of surveillance.
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> 35 Cal. App. 3d at 116, 110 Cal. Rptr. at 588 (emphasis added).

These fears were realized in Dow Chemical, where high-altitude aerial photographs revealed details of the interior of a chemical plant, down to half-inch pipes. With such capabilities, and given the relative newness and technological sophistication of aircraft, it whould be obvious that "[p]lane view is not plain view." Granberg, Is Aerial Surveillance Constitutional, 55 Cal. St. Bar J. 451, 454 (1980). Indeed if it were, persons desiring privacy would have to erect opaque domes over their homes or yards.

Finally, even if one were to assume that some forms of aerial surveillance are constitutional, the ground searches challenged here would still be illegal.

7/ (con't)
The government asserts that aerial searches are constitutional, and thus a farmer must have a diminished expectation of privacy with respect to ground searches. Brief of United States as Amicus Curiae 18 n. 10, Brady. This reasoning is exactly backwards. At times, interpretation of the Fourth Amendment has lagged behind the newer technologies of surveillance, compare Olmstead with Katz, and thus newer methods of invading privacy were temporarily not perceived as "searches" or "seizures." See, e.g., Stachler, 58 Haw. at 412, 570 P.2d at 1323 (aerial surveillance "not a search in the constitutional sense"). But the Court has never seen these newer technologies as an excuse for abandoning established safeguards. See Olmstead. The prohibition of warrantless searches on private property has always been at the very core of the Fourth Amendment. The government's approach, however, instead of expanding the Amendment's reach to meet the times, would abandon even the established core of safeguards as no longer suitable in our Brave New World.

Just last Term, this Court resoundingly rejected the argument that the legitimacy of a privacy expectation turns on the impregnability of the object of the search. In United States v. Ross, 102 S. Ct. 2157 (1982), the Court concluded "that a constitutional distinction between 'worthy' and 'unworthy' containers would be improper." Id. at 2171. Noting that such a distinction might be based on the notion that "the Fourth Amendment protects only those containers that objectively manifest an individual's reasonable expectation of privacy," the Court stressed that "the propriety of a warrantless search necessarily would turn on much more than the fabric of the container." Id., n. 30. Thus, "[a] paper bag stapled shut and marked 'private' might be

found to manifest a reasonable expectation of privacy." Id. Similarly the propriety of a warrantless search should turn not merely on the height or density of the surrounding fence, but rather on "an objective appraisal of all the surrounding circumstances." Id.[8/]

8/ The presence or absence of fences, gates, and signs manifesting intent to exclude has properly proven determinative in the lower courts of whether a particular warrantless search was justified under the "open fields" rationale, i.e., whether the persons claiming Fourth Amendment protection in an outdoor area failed to assert their legitimate expectations of privacy. Compare, e.g., United States v. Lace, 669 F.2d 46 (2d Cir. 1982) (justified where land not posted and outsiders could enter at will); United States v. Miller, 589 F.2d 1117, 1134 (1st Cir. 1978) (justified where "the appellant made no attempt to secure his open land from unwanted visitors"); Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974) (justified where land beyond fence); and United States v. Balsamo, 468 F. Supp. 1363, 1379 (D. Me. 1979) (justified where "[t]here were no 'No Trespassing' signs or fences restricting access to

In our culture, simple precautions ordinarily suffice to put the public on notice that intrusion is not welcome. As a people who value privacy, we are quick to recognize, and equally quick to respect, the signals by which our fellow citizens announce their desires for

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8/ (con't) the property"); with United States v. Dunn, 674 F. 2d 1093 (5th Cir. 1982) (protected where fenced); United States v. Berkshire Beagle Club, Slip Op. M.B.D. No. 80-24-F (D. Mass. Aug. 5, 1981)(protected where posted and fenced); United States v. FMC Corp., 428 F. Supp. 615 (W.D. N.Y. 1977), aff'd, 572 F.2d 902 (2d Cir. 1978) (protected where fenced); United States ex rel. Gedko v. Heer, 406 F. Supp. 609 (W.D. Wis. 1975), vacated and dismissed without opin. sub nom. Gedko v. Cady, 588 F.2d 840 (7th Cir. 1978) (protected where posted and fenced); State v. Brady, 406 So. 2d 1093 (Fla.) cert. granted, 102 S.Ct. 2266 (1982) (No. 81-1636) (protected where posted and fenced); and State v. Byers, 359 So. 2d 84 (La. 1978) (protected where posted and chain across road).

privacy. Thus, one may effectively express a desire to be left undisturbed merely by closing an office door. The unlocked door is hardly impregnable, yet the signal is unmistakable. Similarly, this Court observed in Katz, "[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." Katz, 389 U.S. at 352. Although the simple precautions taken by Mr. Katz did not in fact secure the privacy of his conversation, they were constitutionally sufficient. This Court has never required that in order to merit Fourth Amendment protection a person must effectively preclude unwanted

intrusion. Rather, in considering the reasonableness of asserted privacy expectations, this Court has examined whether the person claiming the Amendment's protection "took normal precautions to maintain his privacy." Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (emphasis added). See also, Rakas, 439 U.S. at 152 (Powell, J., concurring) (in considering the reasonableness of asserted expectations of privacy, this Court "has examined whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy -- that is, precautions customarily taken by those seeking privacy").

Such a pragmatic approach to assessing the reasonableness of asserted privacy expectations is particularly

crucial in the commercial context. Efficient operation of a business often requires that the public be excluded from areas immediately adjacent to those in which it is welcome. Still, employees must be able to move freely between these public and private areas. It is customary, for example, for a restauranteur to announce the privacy of her kitchen with a swinging door, which may, but often does not, bear a sign explicitly limiting access to "employees only." A loading dock may remain open much of the working day with only a simple sign limiting access to business suppliers or customers. A farmer with a retail produce stand may surround the adjacent field with a fence and post "No Trespass" signs to demonstrate a desire to limit the

public to the area of the fruit stand. Although none of these customary precautions is invulnerable to violation, all are recognized and respected by the public. As a government agent without a warrant "stands in no better position than a member of the public," Barlow's, 436 U.S. at 315, one who takes such ordinary precautions to secure commercial premises from public interference may reasonably expect freedom from warrantless governmental intrusion as well. We can guarantee the farmer, the lumberman, and the owner of the commercial dock the right to go about their business free from unnecessary interference, See v. Seattle, 387 U.S. at 543, only if we limit governmental intrusion in accordance with the commands of the Fourth Amendment.

III. ARBITRARY WARRANTLESS INTRUSIONS UPON COMMERCIAL ENTERPRISES THREATEN THE PERSONAL SECURITY AND PRIVACY INTERESTS OF EMPLOYEES

Whenever governmental intrusions interfere with business operations, they are also likely to infringe upon the legitimate personal security and privacy interests of employees. It is, for example, the policy of the Immigration and Naturalization Service (INS) to concentrate its "area control operations," which are designed to detect illegal aliens, on businesses employing aliens. Illinois Migrant Council v. Pilliod, 531 F. Supp. 1011, 1014 (N.D. Ill. 1982). During these operations, agents are stationed "at all exits . . . in order to secure the premises and prevent [suspected aliens] from leaving the premises . . . . [T]he

agents do in fact surround and detain all persons on the premises during control operations." Id. at 1018. See also 128 Cong. Rec. S10248 (daily ed., August 11, 1982) (letter of INS Commissioner Nelson to Senator Simpson, dated August 10, 1982). This Court has already recognized that:

> To approve roving patrol stops of all vehicles . . . would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol Officers . . . Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. United States v. Brignoni-Ponce, 422 U.S. 873, 882-83 (1975).

Similarly, here, if the Court were to approve the government's approach to

"open fields," any government agency could subject large numbers of agricultural workers to unlimited interference with their work and random questioning at any time that they were working. Indeed, the majority below candidly admitted that a major benefit of its blanket approach to the "open fields" doctrine is to permit "law enforcement's making random investigations to detect the production of drugs and moonshine." Oliver, 686 F.2d at 360 n. 5. The INS's practice of moving into commercial enterprises in force and detaining all workers and the free-ranging random investigations for criminal activity expressly encouraged by the court below are comparable to the general searches authorized by the hated colonial writs of assistance. These practices preclude

assurance that individual Fourth Amendment rights can be separately and fully protected in the commercial context if this Court approves the unrestricted "open fields" approach of the decision below.

This Court has frequently reaffirmed individual rights to personal security and privacy in public places. See Katz, 389 U.S. at 359 ("Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures"); Terry v. Ohio, 392 U.S. 1, 8-9 (1968) ("This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs"); Delaware v. Prouse, 440 U.S. 648, 663 (1979)

("[P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles"); Brown v. Texas, 443 U.S. 47, 51 (1979) ("A central concern . . . has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field").

The Court has focused primarily on the severity of the intrusion upon individuals' sense of security in public in assessing the constitutionality of INS and Border Patrol practices. For example, in distinguishing permissible checkpoint stops by the Border Patrol

from impermissible random roving-patrol stops, the Court relied primarily on their differing impact on personal security:

> [T]his objective intrusion--the stop itself, the questioning, and the visual inspection--also existed in roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion--the generating of concern or even fright on the part of lawful travelers--is appreciably less in the case of a checkpoint stop.
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> United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

Similarly, in Prouse, the Court noted that the personal security intrusion effected by a random stop to check documents is no less than that occasioned by a random Border Patrol stop, as both practices entail "an unsettling show of authority" and "may create substantial anxiety." 440 U.S. at 657.

Significantly, the majority below, in the course of rejecting Oliver's Fourth Amendment claim, expressly acknowledged that the situation would be different if the field were occupied by people. It noted that the Fourth Amendment and other laws protecting privacy are important because they "create the conditions and the context for many relationships based on intimacy, friendship and trust . . . and establish an environment in which individual emotional and mental processes can develop freely without surveillance or interference." Oliver, 686 F.2d at 360.[9/] Unfor-

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9/ The privacy concerns of the court below and this Court's vigorous protection of personal security interests in public areas are consistent with social science findings as to the importance of privacy and security in the public domain to individuals' physical

9/ (con't)
and mental health. See, e.g., I. Altman, The Environment and Social Behavior: Privacy, Personal Space, Territory, Crowding 50 (1975) ("the ability to regulate contact [with others] . . . is vital to self-definition"); A. Westin, Privacy and Freedom, 39-42 (1967)(for mental stability and personal development, individuals need to control their environments to avoid having "too much" or "too little" privacy); Gavison, Privacy and the Limits of Law, 89 Yale L. J. 421,447 (1980) (privacy "essential" for "learning, writing, and all forms of creativity" as well as for physical relaxation); Laufer and Wolfe, Privacy as a Concept and a Social Issue: A Multidimensional Developmental Theory, 33 J. Soc. Issues, No. 3, at 22, 33-35 (1977) (one important component of personal privacy is "interaction management," control over the circumstances under which an intrusion upon one's privacy occurs); Marshal, Privacy and Environment, 1 Human Ecology 93 (1972) ("ability to control the degree to which people and institutions impinge upon one's life"); Jourard, Some Psychological Aspects of Privacy, 31 Law and Contemp. Probs. 307, 310 (1966) (privacy enables individuals to cope with public pressures and maintain "physical health and. . . psychological and spiritual well-being"); Shils, Privacy: Its Constitution and Vicissitudes, 31 Law & Contemp. Probs. 281, 282-83 (1966) ("voluntary consent" concerning intrusions is an "essential component" of privacy). See other sources

tunately, the court considered Mr. Oliver's efforts at excluding others from his private property in isolation, and ignored the broad-scale intrusions upon the personal security of individuals on property which its reliance upon after-the-fact review portends. The decision below thus fails to protect the very rights of individual security that it deemed most significant, by permitting warrantless governmental intrusions upon all non-residential areas regardless of the likelihood that people will be there.

The personal security in the public domain that this Court's rulings in Katz, Terry, Brignoni-Ponce, Prouse, and Brown protect would be sacrificed if

9/ (con't) cited in Note, Protecting Privacy under the Fourth Amendment, 91 Yale L.J. 313 n. 4, 321 n. 43, 329 n. 83 (1981).

the workplace were suddenly stripped of its longstanding protection from "surveillance or interference," Oliver, 686 F.2d at 360, or the "unsettling show of authority" Prouse, 440 U.S. at 657, by large groups of roving government agents. The "inestimable right of personal security," Terry, 392 U.S. at 8-9, protected when citizens "step from their homes onto the public sidewalks" and "when they step from the sidewalks into their automobiles" Prouse, 440 U.S. at 663, surely does not evaporate because they drive to work.

For the reasons stated, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

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Respectfully submitted

Margaret Crosby
Alan Schlosser
Amitai Schwartz
ACLU-NC

Joaquin G. Avila
Morris J. Baller
John E. Huerta
Susan E. Brown
MALDEF

David Grabill
CRLA

ERIC NEISSER
Stanford Law School
Stanford, CA 94305
(415) 497-3478

Counsel of Record for
Amici Curiae

Jonathan Hart
James Heard
Law Students*

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